No. 80-2219

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In The

Supreme Court of the United States

DONALD G. DAIL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Trawick H. Stubbs, Jr.
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215 Broad Street
New Bern, NC 28560

Counsel for Petitioner

QUESTION PRESENTED

Did the respondent (Appellee) pursue administrative or judicial remedies which prohibited the Appellant (Petitioner) from accessing tax liability prior to bankruptcy under the terms of Section 17(a)(1)(c) (11 U.S.C. Section 35(a)(1)(c) or Section 17(a)(1)(d) (11 U.S.C. Section 35(a)(1)(d) of the Bankruptcy Act of 1898.

No.

In The

Supreme Court of the United States

DONALD G. DAIL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Donald Dail, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 19, 1980 and that further denial of the Petition for Rehearing which was entered on January 27, 1981.

The opinion of the United States Court of Appeals for the Fourth Circuit is a published opinion rendered December 19, 1980. A copy of the opinion is included in the Appendix as Exhibit "A". The denial of the

Petition for Rehearing was rendered was rendered January 27, 1981 and a copy of that denial is included in the Appendix as Exhibit "B".

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JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. § 1254(1) for review by certiorari of the judgment opinion of the United States Court of Appeals for the Fourth Circuit and of that Order denying rehearing. A written opinion was issued by that Court on December 19, 1980 with one justice dissenting. The Petitioner, Donald G. Dail, timely filed a Petition for Rehearing. That petition was denied by split vote of the panel which rendered the original decision on January 27, 1981. A copy of the Petition for Rehearing is included in the Appendix as Exhibit "A".

STATUTORY PROVISIONS INVOLVED

Relevant portions of Section 17 of the Bankruptcy Act of 1898, now repealed, are set forth in the Appendix as Exhibit "C".

SUMMARY OF THE CASE

The Petitioner, Donald G. Dail, began this proceeding in bankruptcy on December 23, 1976. Petitioner sought a declaration that

any liability for taxes owed to the United States has been discharged on March 15, 1976, in a bankruptcy proceeding. More than ninety days later, the United States (Appellant-Respondent) answered and denied the allegations of the Complaint. Appellant also requested judgment against Plaintiff-Appellee in the amount of Ninety-One Thousand Seven Hundred Sixty-Two and 35/100 Dollars.

Petitioner claimed that Section 17(a) of the Bankruptcy Act of 1898 (11 U.S.C. § 35(a)) discharged any obligation for taxes. Appellant contended that one of two exceptions applied: Section 17(a)(1)(c) (11 U.S.C. § 35(a)(1)(c) - taxes owed when a taxpayer made a false or fraudulent return or willfully attempted to evade or defeat tax). Both parties moved for summary judgment. The bankruptcy judge rejected both motions for summary judgment on December 28, 1977. However, the bankruptcy judge concluded that "the taxes were not assessed by the United States for reasons other than because of the taxpayer's pursuit

of his administrative or judicial remedies." (R. 91.) This left solely the fraud issue to be resolved.

The respondent appealed the decision of the bankruptcy judge, and on September 19, 1979, Judge Larkins, Jr., of the United States District Court for the Eastern District of North Carolina, New Bern Division, accepted a magistrate's finding that the bankruptcy judge's decision should be upheld. The respondent also appeals that decision.

The taxes allegedly owed by the petitioner were for the years 1969, 1970 and 1971. The Internal Revenue Service mailed a thirty-day letter on August 17, 1973. Petitioner did not file any protest with the I.R.S., nor did he file a Petition in the Tax Court for a redetermination of the tax deficiency. (R. 50.) The attorney for the Petitioner notified the I.R.S. on August 20, 1973, that a conference to discuss the tax deficiency was desired only if a reasonable possibility of settlement existed. (R. 56-57)

Petitioner submitted waivers of the restrictions upon assessment and collection (Form 870) on October 29, 1973. (R. 61-62.) These waivers were made contingent upon the acceptance of offers in compromise (Form 656). (R. 63-66.) The I.R.S. did not respond to these offers in compromise. Over one year later, the Petitioner's attorney again submitted offers in compromise for the tax liabilities. (R. 63, 65.) The I.R.S. rejected these offers on September 16, 1975. (R. 67-68.)

Petitioner filed a voluntary petition in bankruptcy on November 10, 1975. On November 21, 1975, the I.R.S. sent Petitioner a second thirty-day letter (R. 70.) The Petitioner received a discharge in bankruptcy on March 15, 1976. (R. 11.) The Petitioner had included tax liabilities in the amount of $104,000.00 on Schedule "A" of his bankruptcy Petition. (R. 6.) Presumably, the United States received notice of the bankruptcy proceeding pursuant to Rule 203(g) of the

Bankruptcy Rules, and the United States has not alleged that it did not receive the notice.

Two days after Petitioner's discharge in bankruptcy, on March 17, 1976, the I.R.S. sent Petitioner's attorney notice that taxes would be assessed pursuant to § 6871(a) of the Internal Revenue Code. (R. 71.) The notice was issued on March 23, 1976, and on March 26, 1976, Petitioner's attorney wrote the I.R.S. and reminded the Service of the Petitioner's pending bankruptcy proceeding. The I.R.S. filed a proof of claim in the Bankruptcy Court on April 13, 1976. The bankruptcy proceeding was closed on August 17, 1976, as a "no assets" case.

SUMMARY OF ARGUMENT

Judge Thomas Moore, bankruptcy judge for the United States District Court for the Eastern District of North Carolina, granted Petitioner a discharge in bankruptcy on March 15, 1976. This discharge relieves Petitioner from any tax obligations owed by

Petitioner, since both parties agreed that the obligations were due and owing more than three years prior to bankruptcy.

Assuming, arguendo, that "bankruptcy" as used in Section 17(a)(1)(c) of the Bankruptcy Act means the filing of a petition, the I.R.S. could have assessed tax deficiencies prior to that time. Respondent could have issued a notice of deficiency thirty days after August 17, 1973. Petitioner did not file any protest within a thirty-day period. Petitioner's offers in compromise were based upon an inability to pay the taxes owed. Respondent could have issued a ninety-day notice and then assessed the tax obligations at any time.

The Respondent was not prohibited from assessing the tax obligations of Petitioner prior to bankruptcy for any of the reasons which would excuse such action. First, instead of being prohibited from assessing the taxes, § 6871 of the Internal Revenue Code (I.R.C.) requires the Respondent to

assess the tax deficiencies after Petitioner filed his bankruptcy petition on November 10, 1975. Respondent did not follow the command of the I.R.C. but, rather, waited more than four months before assessing the tax deficiencies. Respondent's late assessment was based upon summary assessment provisions of § 6871 of the I.R.C. (R. 71.)

Second, Respondent could have assessed the tax deficiencies at any time thirty days after November 21, 1975. Respondent reissued a thirty-day letter to the taxpayer on that date. Petitioner did not and could not pursue any judicial remedy with the Tax Court as to any claim not previously filed. Petitioner did not pursue any administrative remedy after November 21, 1975, and, therefore, Respondent could have assessed the tax deficiencies after thirty days after its thirty-day letter was issued. At that time, no judicial or administrative remedy was being pursued by the taxpayer.

Third, Respondent could have issued a

notice or deficiency on or after September 16, 1975, because no administrative remedies were pending after that date. Had this notice been issued, Respondent could have assessed the deficiencies after December 15, 1975 (ninety days after September 16, 1975). The failure of Respondent to do so could not have been out of concern for the Petitioner, because no settlement was being sought by him.

ARGUMENT

The I.R.S. sent Petitioner a thirty-day letter on August 17, 1973. Petitioner did not file a protest within thirty days, and Petitioner did not question the determination of the deficiency at any time. Rather, Petitioner states that he was unable to pay the full amount of the liabilities. Offers in compromise based solely upon inability to pay rather than on a question as to liability should not be considered on administrative proceeding within the meaning of Section 17(a)(1)(c), because the I.R.S. could have assessed any deficiencies while

the offers to compromise the amount of collection were considered.

In Collier on Bankruptcy, it is pointed out that it would not make any sense to argue that the Commissioner is prohibited by § 6213(a) of the I.R.C. from assessing taxes when the Commissioner is free to issue the notice required by § 6213(a). 1A Collier on Bankruptcy ¶17.14(4) (14th ed. 1976). Another writer would also discharge taxes finally determined, even if not assessed, when the taxes were owed for more than three years. Marsh, "Triumph or Tragedy? The Bankruptcy Act Amendments of 1966," 42 Wash. L. Rev. 681.712 (1966).

Respondent cites numerous cases which it contends hold that I.R.C. § 6213(a) prohibits

assessment prior to bankruptcy unless a ninety-day letter has been issued. However, a closer look at these cases results in a different conclusion. In most of the cases, the issues was conceded by the parties, not determined by the Court. The holdings in the other cases were limited to the specific facts of those cases, facts which are not present in Petitioner's case.

Indian Lakes Estates, Inc. v. Stewart, 428 F.2d 219 (5th Cir. 1970), was the first Court of Appeals interpretation of § 17(a)(1)(c) of the Bankruptcy Act. The Court revealed the difficulty it had:

> This mortal court must attempt to define the intent of Congress in a situation where that intent may well be known only the the Devine. We must say what Congress meant by two brief phrases in a technical proviso passage of an amendment to the dischargeable debt provisions of the bankruptcy laws when an exhaustive examination by

> counsel for both parties and this Court of this history of the legislative processes leading to this enactment fails to disclose that the meaning or the significance of the language critical to our decision was ever really considered.

In Indian Lakes, the taxpayer engaged in "routine administrative adjudgment procedures." Id. at 320. The Court noted that the legislative history showed concern for the rehabilitation of individual bankrupts. Id. at 322. The Court also stated:

> Thus if it is assumed that the draftsment of the 1966 amendments understood tax law and are deemed to have meant what they plainly said, an unassessed federal tax liability is prohibited and therefore not discharged if the "90-day letter" has not been sent out, regardless of how old the subject tax liability may be. Certainly this is true in cases such as

> the one at bar where, due to the complicated nature of the taxpayer's legal affairs, lengthy administrative negotiations with numerous extensions of the statute of limitations are still pending and executory.

Id. at 324.

Petitioner's case is distinguishable from Indian Lakes because (1) Petitioner is an individual and accordingly a proper beneficiary of the rehabilitation afforded by § 17(a)(1)(c) while Indian Lakes concerned a corporation; (2) the taxpayer pursue administrative negotiations in Indian Lakes and signed waivers on the statute of limitations while Petitioner in the present case took neither of those actions. Petitioner never engaged in negotiations as to tax owed. Petitioner made an offer in compromise of a partial payment of the tax liabilities. The amount of deficiency was not disputed. Thus, the forebearance exercised by the I.R.S. in Indian Lakes, where the amount of the

deficiency was being decided, was appropriate, while such forebearance is inappropriate under the present facts, where the amount of the tax deficiencies is clear. The I.R.S. knew the amount of Petitioner's deficiency and could have assessed it. In Indian Lakes, the I.R.S. did not know the amount of deficiency because the administrative proceedings were still pending.

In In re Layton Jewelers, Inc., 332 F. Supp. 1153 (E.D.N.Y. 1971), an audit was pending at the time that a bankruptcy proceeding was filed. Id. at 1166. Therefore, the Court found that assessment of any tax deficiencies was prohibited by § 6213 of the I.R.C. The Court stated:

> Certainly, this is so where an audit is pending pursuant to the government's desire to take a hard look at a business tax return and where administrative negotiations with extensions of the statute of limitations are

pending and executory.

Id. The Court held that no deficiency notice could be sent prior to a deficiency determination, and this determination could not be made until the audit was complete.

Layton can be distinguished from Petitioner's case because (1) the taypayer was a corporation in Layton and not subject to the policy of Section 17(a)(1)(c) that a bankrupt individual is entitled to a fresh start, and (2) an audit was in progress in Layton but not in Petitioner's case.

In In re Michaud, 458 F.2d 953 (3d Cir. 1972), the trustee conceded that "the taxes were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of the bankrupt's administrative and judicial remedies." Id. at 954. Thus, the Court did not need to decide the issue on its own since it was conceded. Michaud is factually distinguishable from Petitioner's case because the bankrupt had filed a petition in the Tax Court for redetermination of his

liabilities, whereas Petitioner in the present case had not.

In In re Greenan, 40 AFTR2d 5390 (1977), the Court said: "The Government claims that it was prohibited from assessment by the pendency of either administrative or judicial proceedings." The Court did note the general prohibition of I.R.C. § 6213(a) in a footnote. 40 AFTR2d at 5391, n.1. However, the Court did not reach the issue because it found that the I.R.S. could have made the assessment during a two-day period after the ninety-day notice period had lapsed.

In In re Greve, 39 AFTR 2d 525 (1977) the taxpayers were notified of proposed deficiencies in their tax return. The taxpayers filed a protest, and the case was pending in the appellate division at the time of the bankruptcy. Greve is factually distinguishable from the case at bar because unlike the taxpayer's action taken in Greve, Petitioner did not file any protest of deficiency. The Court in Greve relied on

the decision in Indian Lakes that when lengthy administration provisions are pending and many extensions of the statute of limitations are outstanding, I.R.C. § 6213(a) prohibits assessment. However, the Court noted: "The issues herein are close. The present state of pertinent law is not poured in concrete." Id. at 530.

In In re Cohen, 21 AFTR2d 992 (1968), the bankrupt party had filed a petition for a redetermination of a deficiency prior to filing in bankruptcy. The Court correctly concluded that no assessment could be made until Tax Court reached a decision. In re Cohen is factually distinguishable from Petitioner's situation because Petitioner had not filed any petition in the Tax Court prior to filing in bankruptcy. Thus, unlike the situation in Cohen, the I.R.S. could have assessed a deficiency.

In In re Ferwerda, 75-2 U.S.T.C. ¶9568 (E.D. Wis. 1975), the Court noted: "It appears to be undisputed that there was by

operation of law a prohibition against assessment imposed by § 6213(a) of the Internal Revenue Code of 1954." Id. at 87, 681. Thus, the Court did not need to consider the issue and could not have held that § 6213(a) barred assessment.

In Wukelic v. United States, 544 F.2d 285 (6th Cir. 1976), the Court said: "Both parties agree that the taxes now at issue were not assessed by reason of the prohibition referred to in the second clause quoted above [Section 17(a)(1)(c) of the Bankruptcy Act; administrative or judicial remedies not exhausted]." Id. at 288. The Court had previously noted: "The taxpayers then sought to pursue their internal remedies within the I.R.S." Id. at 286.

Petitioner in the case at bar did not pursue internal remedies since he filed on protest with the I.R.S. Unlike the administrative remedies of appeal, offers in compromise do not impede Treas. Rec. § 301.7122(d)(2) states: "The submission

of an offer in compromise shall not automatically operate to stay the collection of any tax liability. However, enforcement of collection may be deferred if the interests of the United States are not jeopardized thereby."

Prior to 1966, no tax obligations of a bankrupt were discharged in bankruptcy. In 1966, Congress passed Pub. L 89-396 in order to permit the discharge of tax obligations which became due and owing more than three years prior to bankruptcy. The need for allowing a debtor to make a fresh start was realized. 122 Cong. Rec. 13821 (1966) (remarks of Mr. Hruska). Mr. Hruska, a co-sponsor of the bill, said:

> Experience has shown that some of the taxing authorities are dilatory in making collection of the amounts due them. Income taxes and sales taxes are often allowed to accumulate over a period of years with no attempt to enforce the taxes until bankruptcy

ensues . . .

> The effect of the enactment of this bill will be to challenge the taxing authorities to greater diligence in pursuing their remedies of other creditors. If they shrug their duty, only taxes which become due and owing within the proceding 3 years will be entitled to preferential treatment . . .
>
> There is a policy decision to be made as to whether the Government as a creditor should bear part of the economic burden of business failures through the loss of some of its claims. Part of this decision must weight the fact that the tax authorities have allowed accumulation over a long period of years.

Thus, the bill was intended to speed up the assessment procedures of the I.R.S. or at least to shift the risk of loss to tax revenue due to bankruptcy to the I.R.S. when the assessment proceedings were not promptly

carried out.

Congressional concern was voiced over allowing a debtor to have tax liabilities discharged before the I.R.S. could assess the tax deficiencies. Id. at 13820-22. In response, it was pointed out that exemptions were provided for cases in which taxpayers did not make proper returns, thereby preventing the I.R.S. from assessing the tax in a timely manner. Id. These exemptions, including Section 17(a)(1)(c), were intended then to disallow a discharge of tax obligations prior to the time at which the I.R.S. could have been expected to assess any tax deficiencies. Thus, the exceptions were directed toward discharges in bankruptcy, not the filing of a bankruptcy proceeding.

Section 17(a)(1) of the Bankruptcy Act of 1898, now repealed, provided in part:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1)

> are taxes which become legally due and owing by the bankrupt to the United States . . . within three years preceding bankruptcy: Provided, however, that a discharge in bankruptcy shall not release a bankrupt from any taxes . . . (c) which were not reported on a return made by the bankrupt and which were not assessed prior to the bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt.

Both parties agree that (1) the taxes were due and owing more than three years prior to a filing in bankruptcy and (2) the taxes were not reported within the means of Section 17(a)(1)(c).

Section 6871(a) of the I.R.C. provides:

> Upon the adjudication of bankruptcy of any taxpayer in any liquidating proceeding the filing of (where approval is required by the Bankruptcy

> Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided by law) determined by the Secretary or his delegate in respect of a tax imposed by subtitle A or B upon such taxpayer shall, despite the restrictions imposed by Section 6213(a) upon assessments, be immediately assessed if such deficiency has not heretofore been assessed in accordance with law.

Thus, the I.R.C. § 6871(a) removes the notice requirement of I.R.C. § 6213(a). Respondent could have and should have assessed the tax deficiencies immediately after Petitioner filed his Petition. No case found has ever considered I.R.C. § 6871(a) in conjunction

with Section 17(a)(1)(c) of the Bankruptcy Act. The phrase in Section 17(a)(1)(c) "which were not assessed prior to bankruptcy" should be read to mean prior to bankruptcy discharge, because Section 17 concerns discharges of debts, and the limitations upon discharge are intended to prevent the discharge of tax liabilities before the I.R.S. could have assessed them.

Section 6871(a) allowed the I.R.S. to assess the tax liabilities of the Respondent because the amount had been determined and (2) no Tax Court case was pending. Section 6871(b) does not allow an immediate assessment if either of these situations applies. Section 6871(b) states that if a Tax Court case is pending, the Commissioner shall still file a claim. Section 6871(b) accordingly restricts the broad assessment power given in § 6871(a) of the I.R.C. because it states that a claim shall be filed rather than assessed.

Respondent could have assessed the

tax deficiencies any time thirty days after November 21, 1975. After the I.R.S. issued the thirty-day letter on November 21, 1975, Petitioner could not have pursued a judicial remedy in the Tax Court and thereby have prohibited any petitioner's being filed with the Tax Court. I.R.C. § 6871(b). Petitioner did not pursue any administrative remedy after November 21, 1975.

On September 16, 1975, Respondent rejected Petitioner's offers in compromise. No administrative proceeding was pending after that date. Respondent should have issued a ninety-day notice letter. Unlike the situation in Indian Lakes and Wukelic, no administrative proceeding was pending after that date. Respondent should have issued a ninety-day notice letter. Unlike the situation in Indian Lakes and Wukelic, no administrative proceedings were pending, and therefore there was no excuse for delay. The legislative history makes clear that prompt assessments were to be made. 112 Cong. Rec.

at 13821 (1966).

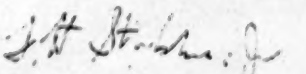
If the ninety-day notice letter had been issued then the taxes could have been assessed on December 15, 1975, or four months before the tax obligations were discharged on March 15, 1976.

At least two commentators conclude that if the I.R.S. could have issued a ninety-day letter and assessed taxes but did not of its own choosing, then tax liabilities should be discharged regardless. 1A Collier on Bankruptcy ¶17.14(4) (14th ed. 1976); Marsh, "Triumph or Tragedy? The Bankruptcy Act Amendments of 1966," 42 Wash. L. Rev. 681, 712 (1966).

CONCLUSION

For the aforesaid reasons, a writ of certorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted



Trawick H. Stubbs, Jr.
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this pleading upon the other counsel to this action by depositing a copy thereof in an envelope bearing sufficient postage in the United States Mail addressed to said counsel, this the 15th day of June, 1981.

TRAWICK H. STUBBS, JR.
Attorney for Petitioner
P. O. Drawer 1654
215 Broad Street
New Bern, NC 28560
(919) 633-2700

TO: Solicitor General
Department of Justice
Washington, D.C. 20530

AFFIDAVIT OF SERVICE

In accordance with the Rules of the Supreme Court of the United States, I hereby certify that I have this day mailed via Purolator service the required copies of the Petition for Writ of Certiorari to the Clerk's Office of the Supreme Court of the United States.

This the 15th day of June, 1981.

BY: Barbara E. Grove
Lawyer's Printing Co.
P. O. Box 1654
Richmond, VA 23219

Sworn to and subscribed before me this the 15th day of June, 1981.

Cynthia J. Gray
NOTARY PUBLIC

My Commission expires:

8/10/84.

EXHIBIT "A"

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO.: 79-17969

DONALD G. DAIL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. John D. Larkins, Jr., Senior District Court Judge.

Argued: October 6, 1980

Decided: December 17, 1980

Before, HALL, MURNAGHAN and ERVIN, Circuit Judge.

Wynette J. Hewett, Tax Division, Dept. of Justice (George M. Anderson, United States Attorney; M. Carr Ferguson, Assistant Attorney General; Gilbert E. Andrews, Karl Schmeidler, Tax Division, Dept. of Justice on brief) for Appellant; Trawick H. Stubbs, Jr. for Appellee.

MURNAGHAN, Circuit Judge:

Appellee filed a voluntary petition in bankruptcy on November 10, 1975. On March 15, 1976 he was granted a discharge, and on August 17, 1976 the bankruptcy proceeding was closed as a "no assets" case.

The I.R.S. had been attempting since 1973 to collect[1] from Appellee[2] taxes which it claimed Appellee owed for the years 1969, 1970 and 1971. It is not seriously contended that the taxes claimed were not in fact due.

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[1]The attempts were somewhat lethargic. Exchanges of correspondence between I.R.S. and counsel for the taxpayer occurred between August 17, 1973 and October 29, 1973. The record reflects no activity at all between October 29, 1973 and May 21, 1975. However, on May 21, 1975, the taxpayer offered an aggregate of $15,000.00 in settlement of the tax claims payable in installments. The offer was rejected by the I.R.S. on September 16, 1975. The deficiencies for the three years as determined by the Commissioner totalled $49,257.74.

[2]For one of the three years involved, appellee and his wife filed a joint return. Due to the conclusion we have reached, her involvement is of no special significance. For convenience we shall refer simply to the appellee as the taxpayer.

The negotiations rather centered on the taxpayer's attempt to get the I.R.S. to accept a reduced figure to compromise a claim of doubtful collectibility, due to taxpayer's precarious financial position.

On March 17, 1976 the I.R.S. sent Appellee's attorney a notice that the taxes were being assessed and on March 23, 1976 the I.R.S. issued a notice of deficiency (the ninety-day letter), 26, U.S.C. §§ 6212, 6213. Appellee's attorney responded on March 26, 1976, informing the I.R.S. of the bankruptcy proceedings, and on April 13, 1976 the I.R.S. filed its proof of claim in the Bankruptcy Court.

Appellee then on December 13, 1976, petitioned the Bankruptcy Court to reopen the bankruptcy proceedings for a determination that the tax liabilities had been discharged. The Bankruptcy Court granted the petition to reopen. The parties filed a stipulation of facts. Appellee moved for summary judgment and the I.R.S. moved for partial summary

judgment.

The I.R.S. claimed there was no discharge by reason of the bankruptcy because of 11 U.S.C. § 35(a)(1)(c) and (d) (§17a(1)(c) and (d) of the Bankruptcy Act).[3] The language of moment reads:

> A discharge in bankruptcy shall release a bankruptcy from all his provable debts . . .
>
> Provided, however, that a discharge in bankruptcy shall not release a bankrupt from any taxes . . .
>
> (c) which were not reported on a return made by the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt,

---

[3]The code reference is to the Bankruptcy Act of July 1, 1898, as amended, repealed on November 6, 1978, effective October 1, 1979. The repealed section here controls, because of the provision in the Bankruptcy Reform act of 1978 that a matter or proceeding initiated under the Bankruptcy Act should

(d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat.

The Bankruptcy Court decided that the taxes were not rendered nondischargeable by Section (c), holding that the government's failure to assess the taxes prior to bankruptcy was not due to a "prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt." It therefore denied the government's motion for partial summary judgment. The Bankruptcy Court also denied Appellee's motion for summary judgment because a factfinding hearing would be necessary to determine whether, under subsection (d), Appellee had

---

[3] (Cont'd)
be conducted and determined as if the new law had not been enacted. Publ. L. 95-598, Title III, § 403(a), November 6, 1978.

filed fraudulent returns or had willfully attempted to evade or defeat the taxes.

The district court adopted the recommendation of the magistrate to whom it had referred the case and affirmed the decision of the Bankruptcy Court. The government appealed.

I.

At first blush it appears premature for the case to have reached us. No decision in favor of either party has been reached. All that has happened is that opposing motions for summary judgment have each been denied and the respective claims remain for plenary disposition. However, in a bankruptcy matter, 11 U.S.C. § 47(a) provides in pertinent part:

> The United States Court of Appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, as invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings

in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, review, or reverse, both in matters of law and in matters of fact... (emphasis supplied.) Hence, appealability exists even though the Orders were interlocutory, provided that they occurred in proceedings in bankruptcy. Columbia v. Lochner, 179 F.2d 630, 635 (4th Cir. 1950); In re Durensky, 519 F.2d _____, No. 78-1784, slip op. at 5 (4th Cir. Oct. 29, 1980).[4]

Turning to the merits, we first must consider the effect of 11 U.S.C. § 35(a)(1)(c) which renders nondischargeable in bankruptcy taxes "not reported on a return . . . and ...

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[4]There is an esoteric distinction between proceedings in bankruptcy" and controversies arising in proceedings in bankruptcy." As to "proceedings in bankruptcy," whether interlocutory or final, the statute confers appellate jurisdiction. No such right of appeal for interlocutory matters exists, however, for "controversies arising in proceedings in bankruptcy." Such controversies "present distinct and separable issues between the Trustee and adverse claimants concerning the right and title to the

not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt."

There is no dispute that the taxes were not reported on a return made by the bankrupt. The taxpayer concedes that such was the case.

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[4] (Cont'd)
bankrupt's estate." In re Durensky, supra, 519 F.2d 1024, at 1027; United Kingdom Mutual Steamship Assurance Ass'n v. Liman, 418 F.2d 9, 10 (2d Cir. 1969). Compare Columbia Foundry Co. v. Lochner, supra, 179 F.2d 630, at 635. There is also a judicially created exception to the immediate appealability under 11 U.S.C. § 47(a) for orders which involve "preliminary or procedural matters" or which lack "definitive operative finality." In re Abigdon Realty Corp., supra, slip op. at 5; Carolina Mills, Inc. v. Corry, 206 F.2d 76, 77 (4th Cir. 1953); In re Durensky, supra, 519 F.2d 1024 at 1029.

Since, however, the order here disposes of a right or duty asserted by one of the parties, independent of any issue affecting or involving the right or title to the bankrupt's estate, as between the trustee and an adverse claimant, and since the order here has definite operative finality as to the issue decided, it is appropriate for us to hear and dispose of the appeal.

The arcane distinction between "proceedings" and "controversies arising in proceedings" is eliminated by the Bankruptcy Reform Act of 1978. Under it, "only final orders of the trial court in bankruptcy matters are appealable to the Courts of Appeals." In re Licek Potato Chip Co., 599 F.2d 181, 183, fn. 2 (7th cir. 1979).

It is equally clear that the bankruptcy, for these purposes took place on the filing of the petition on November 10, 1975, not at the later time of the discharge of the bankrupt on March 15, 1965.[5] Hence a lifting, after November 10, 1975, of the prohibition on assessment pending the exhaustion of administrative or judicial remedies, if such a prohibition was in existence up to that date, would not achieve discharge of the tax liabilities. Only a termination of the prohibition on assessment "prior to bankruptcy" would accomplish that result.

The issue of whether there was a prohibition on assessment pending the exhaustion of administrative or judicial remedies illustrates how difficult to understand language may become for a casual reader when extremely technical areas such as taxation or bankruptcy are concerned and especially when the two are

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[5]See 11 U.S.C. § 1(13): "'Date of Bankruptcy', 'time of bankruptcy', 'commencement of proceedings', or 'bankruptcy', with reference to time, shall mean the date when the petition

combined. There is no ambiguity over the phrase "administrative or judicial remedies." The conducting of negotiations, up until they were broken off on September 16, 1975, constituted administrative remedies. In re Indian Lakes Estates, Inc., 428 324 (5th Cir. 1970), cert. denied sub nom. Stewart v. United States, 400 U.S. 964 (1970) In re Greve, 39 A.F.T.R.2d 77-525, 76-2 U.S.T.C. ¶9568, 87, 681 (E.D. Wisc. June 23, 1975); In re Layton Jewelers, Inc., 332 F. Supp. 1153, 1166 (S.D.N.Y. 1971) ("The pendency of all the steps before assessment can lawfully be made must be held to be the pendency of administrative remedies available to the bankrupt ...")

The same clarity does not, however, exist for the term "prohibition." It is undoubtedly true that, through its power to make jeopardy assessments under 26 U.S.C. §§ 6851, 6861, the I.R.S. was able to make an assessment at

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[5](Cont'd)
was filed."

any time. So, in the customary sense of the language, there was no prohibition. "Prohibition," for the purpose of the statute with which we are concerned, however, has a very specialized and limited, or partial, meaning, referring to the requirement that, in the case of ordinary assessments,[6] they must be preceded by a 90-day letter, with the assessment to be made only upon expiration of the ninety days.[7] Prior to compliance with the 90-day letter requirement, assessment, in a non-jeopardy assessment sense, is prohibited.

The cases, while few in number, uniformly support the I.R.S. position that it was, throughout the proceedings, until after bank-

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[6] As distinguished from jeopardy assessments.

[7] See 26 U.S.C. § 5213(a):

(a). . . Within 90 days . . . after the notice of deficiency authorized in Section 6212 is mailed . . . the Tax Court for a redetermination of the deficiency. Except as otherwise provided in Section 6851 or Section 6861 no assessment of a deficiency in respect of any tax imposed by Subtitle A or B, Chapter 41, 42, 43, 44 or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such

(Footnote 7 continued on next page)

ruptcy, under a prohibition. In re Indian Lakes Estates, Inc., 428 F.2d 319, 323-24 (5th Cir. 1970), cert. denied sub nom. Stewart v. United States, 400 U.S. 964 (1970); In re Greve, 39 A.F.T.R. 2d 77-525, 76-2 U.S.T.C. ¶9805, at p. 85, 631 (W.D. Okla. November 15, 1976); In re Layton Jewelers, Inc., 332 F. Supp. 1153, 1165-66 (S.D.N.Y. 1971); see also In re Ferwerda, 36 A.F.T.R. 2d 75-5413, 75-2 U.S.T.C. ¶9568 (E.D. Wisc., June 23, 1975).

The taxpayer cites 1A Collier on Bank-

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[7] (Cont'd)
notice has been mailed to the taxpayer, nor until the expiration of such 90-day . . . period, . . . nor, if a petition has been filed with the Tax Court, until the decision has become final

(Emphasis added.) Taypayer filed no petition with the Tax Court and could not have done so until a 90-day letter had been sent.

ruptcy, ¶12.14(4) (14th ed. 1978)[8] in support of the proposition that the taxes were discharged. Even if the citation from Collier were deemed to support the taxpayer, we do not believe it can prevail in the face of cases uniformly decided in a contrary fashion.

Properly read, the Collier statement addresses a situation in which, prior to bankruptcy, there is a cessation of all administrative or judicial remedies, and therefore, still before bankruptcy, 90 days or more also elapse, so that an ordinary assessment could have been made. The Collier language is "if an assessment could have been made before bankruptcy

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[8]The exception in (c) is not clear as possible. A conceivable construction of it could be that if the Government made a pre-bankruptcy assessment (once the prohibition was lifted), the tax is dischargeable. This construction is illogical; the distinction serves no apparent purpose. The meaning that should be attributed to the language is that the tax may be dischargeable if an assessment could have been made before bankruptcy (whether it was or not), and the tax debt is more than three years old. If actual

(Footnote 8 continued on next page.)

(whether or not it was)."[9] In the instant case, bankruptcy came less than 90 days (55 days to be exact) after the termination of pursuit of administrative or judicial remedies. So no ordinary assessment before bankruptcy could have been made and Collier does not support the position of the taxpayer.

The taxpayer also seeks to capitalize on the lackadaisial approach by the government to its business of fostering prompt collection of taxes. The I.R.S. responds with criticisms of the taxpayer and an attempt to shift the blame for the delay. It alludes to a supposed congressional purpose not to multiply bankruptcies brought on by too immediate action by the I.R.S. when its proceeding more

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[8] (Cont'd)
assessment at any time before the bankruptcy was a key factor to effectuate non-dischargeability, there would be no need for the second proviso in § 17a(1) removing tax liens from dischargeable debts.

[9] We have no occasion to consider whether discharge in Collier's review, would have occurred, once 90 days had run following the termination of negotiations, whether a notice of deficiency

deliberately might facilitate avoidance of bankruptcy altogether. In re Michaud, 458 F.2d 953, 958-59 fn. 17 (3d Cir. 1972), cert. denied, 409 U.S. 876 (1972). In all events it is not necessary for us to point the finger.[10] In Indian Lake, supra, 428 F.2d at 324, it was unambiguously stated:

> [A]n unassessed federal tax liability is prohibited and therefore not discharged if the "90-day letter" has not been sent out, regardless of how old the subject tax liability may be.

Accord, In re Greve, 39 A.F.T.R. 2d 77-525, 76-2 U.S.T.C. ¶9805 (W.D. Okla., November 15, 1976); In re Ferwerda, 36 A.F.T.R. 2d 75-5413, 75-2 U.S.T.C. ¶9568 (E.D. Wisc., June 23, 1975); In re Laytan Jewelers, Inc., 332 F. Supp. 1153, 1155 (S.D. N.Y. 1971).

Although desultory, the negotiations were continuing up until September 15, 1975,

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[9] (Cont'd)
(the 90-day letter) had been sent, and the 90 days had not run.

[10] The parties agreed that a six-year limitations period applied. Taxpayer had understated his gross income by more than 25 percent. 26 U.S.C. § 6051(e). The limitations as to the earliest of the three years.

they were broken off by the I.R.S. rejection of the taxpayer's offer in compromise. There is a question whether, upon the breaking off of negotiations, since thereafter there were no longer pending administrative or judicial remedies available to the bankrupt awaiting exhaustion, the proviso of 11 U.S.C. § 35(a)(1)(c) precluding discharge was met. The statutory protection of the government against discharge concerns taxes not assessment "pending the exhaustion of administrative or judicial remedies available to the bankrupt."

The argument would run that, prior to bankruptcy, after September 16, 1975, while a prohibition on assessment had not yet ceased, nevertheless the prohibition was no longer "pending exhaustion of administrative or judicial remedies." However, the argument will not withstand scrutiny. While

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[10] consequently, would not have expired until April 15, 1976. The notice of deficiency was transmitted on March 23, 1976.

no administrative or judicial remedies were pending from and after September 16, 1975, they had not yet been exhausted because the taxpayer, once the 90-day letter was sent, still had the 90 days to file a petition in the Tax Court for a redetermination of the deficiency. 26 U.S.C. § 6213(a). Thus, the prohibition on assessment which had, prior to September 16, 1975, come into existence and thereafter continued to exist, pending the exhaustion of administrative or judicial remedies, remained outstanding, even after September 16, 1975, until the 90-day letter could be sent, and the ninety-day period could expire or the Tax Court make its determination. Even the immediate transmission of the 90-day letter on September 16, 1975, could not have taken the present case out of the statutory language of Subsection (c) setting out a ground for non-dischargeability, because the prohibition on assessment necessarily remained existant at least until December 15,

1975 (90 days), i.e. beyond November 10, 1975, the date of bankruptcy.

The argument would, of course, have pertinence had the ninety-day letter in fact been filed and the ninety days run prior to bankruptcy. In re Greenan, 40 A.F.T.R. 2d 5390, 77-2 U.S.T.C. ¶9591 (W.D.N.Y. July 8, 1977). Arguably, it might even prevail if there had been time between the break-off of negotiations and bankruptcy for a ninety-day letter to have been sent, and the ninety-day period to have expired, even if the letter, in fact, had not been sent.[11] However, with the break-off of negotiations occurring on September 16, 1975, even had the letter been sent immediately on September 16, 1975, the government would have continued to have been prohibited from assessment of the taxes until a date subsequent to filing of the petition for bankruptcy. In effect the ninety days from the time administrative or judicial

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[11] See footnotes 8 and 9, supra.

remedies are no longer pending falls within the terminology "prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt."

Accordingly, the decision denying partial summary judgment to the I.R.S. is reversed. The case is remanded to permit appropriate further proceedings following the entry of the requested partial summary judgment.

REVERSED AND REMANDED.

HALL, Circuit Judge, dissenting:

The majority has concluded that Dail's tax liability was not dischargeabile in bankruptcy due to a prohibition against assessment. From this conclusion I must respectfully dissent.

The record discloses that from October, 1973, until May, 1974, the I.R.S. did absolutely nothing with Dail's offers of compromise. The administrative proceedings, which are charitabily characterized by the majority as "desultory," are completely

devoid of any effort by the I.R.S. to consider or reconcile Dail's 90-day letter on March 23, 1976, eight days after Dail's discharge in bankruptcy, four months after filing of the bankruptcy petition and six months after the termination of negotiations.

The majority states that prior to issuance of the 90-day notice, the I.R.S. was prohibited from assessing taxes. (Slip Op. 8). While I agree with this statement, it has no application here because the I.R.S. made no attempt to promptly issue the notice. The 90-day notice is a mandatory link in the chain of events leading to the actual assessment of taxes. When negotiations ceased, event when viewed from the government's position, the I.R.S. had the option to either initiate the assessment proceedings by issuing the notice, or to do nothing to risk the discharge of the taxes in bankruptcy. The I.R.S. chose the latter.

I would hold that on the date of bankruptcy no administrative or judicial

proceedings were pending because of the failure of the I.R.S. to issue the 90-day notice. Accordingly, I would affirm the bankruptcy court.[1/]

1/ The ultimate discharge of Dail's tax liability would still depend upon the resolution of the allegations of fraud and willful evasion of taxes now pending in district court.

EXHIBIT "B"

THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 79-1769

Donald G. Dail,

Appellee,

versus

United States of America,

Appellant.

O R D E R

Upon consideration of the appellee's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Ervin. Judge Hall dissents.

For the Court,

s/ WILLIAM K. SLATE, II
CLERK

EXHIBIT "C"

A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any state or any subdivision thereof within three years preceding bankruptcy; provided, however, that a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made by the bankrupt and which were not assessed prior to bankrutpcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false

or fraudulent return, or willfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or to any state or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this act; and provides further, that a discharge in bankruptcy shall not release or effect any tax lien;

Treas. Reg. § 301.7122(d)(2)

Stay of Collection. The submission of any offer in compromise shall not automatically operate to stay the collection of any tax liability. However, enforcement of collection may be deferred if the interests of the United States shall not be jeopardized thereby.

Internal Revenue Code of 1954

§ 6213(a):

Restrictions applicable to deficiencies; petition to Tax Court.

(a) Time for filing petition and restriction on assessment. Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, ad the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Internal Revenue Code of 1954

§ 6871(b):

Claim filed despite pendency of Tax Court proceedings. In the case of a tax imposed by subtitle A or B claims for the deficiency and such interest, additional amounts, and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for redetermination of the deficiency in pursuance of a petition to the Tax Court; but no petition for any such redetermination shall be filed with the Tax Court after the adjudication of bankruptcy, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of the receiver. (Aug. 16, 1954, ch 736, 68A Stat. 838; Sept. 2, 1958, P.L. 85-866, Title I, § 88, 72 Stat. 1665; Oct. 4, 1976, P.L. 94-455, Title XIX, Subtitle A, § 1906(b)(13)(A), (c)(1), 90 Stat. 1834.)

1A Collier on Bankruptcy ¶ 17.14(4) (14th ed. 1976)

[4] - Assessment Barred by Pending Procedures; § 17a(1)(c)

The third exception, § 17a(1)(c), involves taxes "which were not reported on a return made by the bankrupt and which were not assessed prior to the bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt." This exemption would apply particularly to income, estate and gift taxes.[24]

Secondly, the exception applies where assessment before bankruptcy is prohibited because judicial or administrative remedies available to the taxpayer-bankrupt have not been exhausted. For example, after the determination by the Service of a deficiency[25] and mailing of such notice, the taxpayer has

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[24]For example, In re Savage, 329 F. Supp. 968 (C.D. Cal. 1971). See I.R.C. §§ 6213(a), 7485(a).

[25]"If the Secretary or his delegate determines that there is a deficiency in respect fo any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail." I.R.C. § 6512(a).

ninety days within which to file a petition for redetermination of the deficiency with the Tax Court.[26] This is the so called ninety-day letter. During the ninety days, no assessment may have been made until the decision of the Tax Court becomes final.[27]

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[26]"Within 90 days . . . after the notice of deficiency authorized in section 6212 is mailed . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in Court for its collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day . . .period, as the case may be, nor, if a petition has been filed with the Tax Court has become final . . ." I.R.C. § 6213(a).

As a matter of fact, various procedures adopted by the Internal Revenue Service will take place before the ninety-day letter is transmitted, even though such procedures are not statutorily required. Conferences on the district level in various stages which do not result in agreement will precipitate a thirty-day letter. Upon transmittal of this letter, the taxpayer has thirty days to file a written protest and he may have a conference in the Appellate Division. After consideration of the matter by the Appellate Division or expiration of the thirty-day period where notice of protest is not filed, the statutory notice of deficiency is sent out, i.e., the ninety-day letter. See Reg. §§ 601.105(a), (b), (c)(1)(i), (2)(i), (d)(iv); 601.106(3)(b),(d)(1)(ii). During the period before the ninety day letter is sent, no assessment may be made. I.R.C. § 6213(a)

(Footnote 26 continued on next page)

Once the prohibition is lifted either because of the expiration of the ninety days or the finality of a decision, assessment may be made. Consequently, if a bankruptcy petition is filed more than three years after the tax became "legally due and owing" (the date the return was due[28]), the tax liability is dischargeable. The fact that the assessment was or could have been made within three years of bankruptcy is immaterial. The Government's protection, once the stay of assessment is lifted, is found in its ability to assess (create a lien) and file notice of the lien (perfect it) so that it will remove the tax to the second proviso and render it non-dischargeable.

If, on the other hand, the administrative or judicial proceedings are still pending at bankruptcy, and the Government remains unable at that date to assess the tax, it would be non-dischargeable within this exception.

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[26](Cont'd)
states that "no assessment of a deficiency ... shall be made until such notice [90-day letter] has been mailed to the taxpayer. . . " and, generally, the notice may not be mailed until the procedures adopted in the Regulations cited supra, have been completed.

[27]The decision of the Tax Court does not become final until the appellate process has been completed. I.R.C. § 7481. See, e.g., Taylor v. Comm'r 258 F.2d 89 (2d Cir. 1958) (decision of Tax Court is not final until appellate procedures are exhausted or barred by lapse of time).

[28]See [1] supra.

It should be noted that exception (c) is not related to either (a) or (b). In the first two, cases are covered where no return was filed. In this one, (c), a return was filed but a deficiency was alleged or proved.

The exception in (c) is not as clear as possible. A conceivable construction of it could be that if the Government made a pre-bankruptcy assessment (once the prohibition was lifted), the tax is dischargeable. But if no assessment was made, event it it could have been, the tax is not dischargeable.[29]

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[29]In In re Indian Lakes Estates, Inc., 428 F.2d 319 (5th Cir. 1970), citing Treatise, the Court wrestled with this problem, noted the lack of legislative history, and came to the conclusion that the plain meaning of the statute must apply. There is a good discussion of the problem in the opinion.

See Shapiro, "Discharging Taxes in Bankruptcy: How It Works, The Problems Involved," 35 J. Taxation 168 (1971); Notes, 4 Creighton L. Rev. 349 (1971); 25 S.W.L.J. 326 (1971).

In another approach to the same problem, the court in In re Michaud, 317 F. Supp. 1002 (W.D. Pa. 1970), citing Treatise, discusses the Indian Lakes decision but comes to a different conclusion. It notes that "the meaning of the statutory provision is doubtful and this entitles the court to consider the fundamental policy of the statute." Indian Lakes was distinguished, among other grounds, on the fact that that case was dealing with a corporate bankrupt where rehabilitation was not contemplated whereas in the present case "[d]ischarge from liability is an essential element of effective rehabilitation for individual bankrupts." Michaud rev'd 458 F.2d 953 (3d Cir. 1972), citing Treatise, the court holding that the "taxes . . . not reported"

This construction is illogical; the distinction serves no apparent purpose. The meaning that should be attributed to the language is that the tax may be dischargeable if an assessment could have been made before bankruptcy (whether it was or not), and the tax debt is more than three years old. If actual assessment at any time before bankruptcy was a key factor to effectuate non-dischargeability, there would be no need for the second proviso in § 17a(1) removing tax liens from dischargeable tax debts. As shown earlier,[30] the tax lien arises on assessment but the second proviso means perfected tax liens where notice has been filed.

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[29] (Cont'd)
of § 17a(1)(c) include a tax deficiency ultimately established by the government. The court cited the Indian Lake decision in support of its holding, and noted, as that case did, the difficulty in interpreting the statute. See 112 Cong. Rec. 13179 (1966).

[30] See [2] supra.

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No. 80-2219

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD G. DAIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
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In the Supreme Court of the United States

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DONALD G. DAIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented by the petition is whether the court of appeals correctly held that petitioner's federal income tax liabilities for 1969 through 1971 were not discharged in bankruptcy, because assessment of the taxes was prohibited prior to bankruptcy pending the exhaustion of petitioner's administrative and judicial remedies within the meaning of Section 17a(1)(c) of the Bankruptcy Act, 11 U.S.C. 35(a)(1)(c).

The pertinent facts may be summarized as follows: On August 17, 1973, following an audit of petition-

er's income tax return for 1969, the Internal Revenue Service mailed a 30-day letter to petitioner and his wife containing proposed adjustments, and stating that if they agreed with the proposed adjustments they should sign the agreement form and pay the tax due, but that if they disagreed, they could request a conference to settle the dispute. The letter further stated that, in the absence of further advice from petitioner within 30 days, the case would be processed on the basis of the proposed adjustments (App. 50).[1] Three days later, on August 20, 1973, petitioner's counsel sent a letter to the Internal Revenue Service stating that he was concerned with all of petitioner's prior liabilities, that petitioner was not in a position to pay large sums at one time, and that petitioner would like to attempt a settlement, if a settlement were feasible (App. 56-57). Thereafter, following a conversation between petitioner's counsel and a member of the review staff of the District Director's office, petitioner submitted offers in compromise of his 1969 through 1971 liabilities (App. 59-62). Subsequently, on May 21, 1975, petitioner submitted new offers in compromise with respect to those taxable years, increasing the amounts offered (App. 63-66). In this connection, he executed waivers of the limitations period (*ibid.*). On September 16, 1975, the Internal Revenue Service rejected the offers (Pet. App. 29). Approximately two months later, on November 10, 1975, petitioner filed a voluntary petition in bankruptcy. On March 15, 1976, he was granted a discharge, and on August 17, 1976, the bankruptcy case was closed as a "no assets" case (Pet. App. 29).[2]

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[1] "App." refers to the joint appendix filed in the court below.

[2] On March 23, 1976, the Internal Revenue Service assessed income taxes in the total amount of $49,257.74, plus interest,

Petitioner thereafter requested the bankruptcy court to reopen the case and determine the dischargeability of his income tax liabilities for 1969 through 1971 (Pet. App. 30). Petitioner filed a motion for summary judgment asserting that the taxes were dischargeable, and the government filed a cross-motion for partial summary judgment asserting that the taxes were nondischargeable under Section 17a(1)(c) and (d) of the Bankruptcy Act (Pet. App. 31). The bankruptcy court rejected the government's reliance on Section 17a(1)(c) and held that a trial would be required to determine whether the taxes were nondischargeable under Section 17a(1)(d) (Pet. App. 32). The district court affirmed (Pet. App. 33).

The court of appeals reversed in favor of the government. It held that petitioner's tax liabilities were not discharged in the bankruptcy because the assessment of the liabilities had been prohibited prior to bankruptcy within the meaning of Section 17a(1)(c) of the Bankruptcy Act (Pet. App. 36-47).

1. The decision below correctly held that petitioner's tax liabilities were not discharged in bankruptcy. Section 17a(1)(c) of the Bankruptcy Act renders nondischargeable taxes "not reported on a return * * * and * * * not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt."[3] Petitioner conceded in

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and the government filed its proof of claim in the bankruptcy proceedings on April 13, 1976 (Pet. App. 30; App. 80-81).

[3] The new Bankruptcy Code does not incorporate the terms of Section 17a(1)(c). Instead, in order to cure abuses by taxpayers that had developed under that provision, Congress enacted two provisions (11 U.S.C. (Supp. III) 507(a)(6)(A) and 523(a)(1)(A)), which generally bar a discharge where

the court below (Pet. App. 35) that the taxes involved here were not reported on a return. Nor can there be any serious question that in submitting the offers in compromise, petitioner invoked his administrative remedies. See *In re Indian Lake Estates, Inc.*, 428 F.2d 319, 324 (5th Cir.), cert. denied, 400 U.S. 964 (1970); *In re Greve*, 39 A.F.T.R.2d 77-525 (W.D. Okla. Dec. 6, 1976); *Ine re Ferwerda*, 36 A.F.T.R.2d 75-5413 (E.D. Wisc. June 23, 1975; *In re Laytan Jewelers, Inc.*, 332 F. Supp. 1153, 1166 (S.D.N.Y. 1971).[4]

Petitioner argues (Pet. 6-8) that prior to bankruptcy, assessment of the taxes was not prohibited within the meaning of Section 17a(1)(c). It is true, as the court of appeals pointed out (Pet. App. 37-38), that the Internal Revenue Service has the power to make jeopardy assessments pursuant to Sections 6851 and 6861 of the Internal Revenue Code of 1954

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the assessment is within the limitations period and afford the Internal Revenue Service additional periods for assessing taxes where the bankrupt has invoked judicial and administrative remedies. See generally 3 *Collier on Bankruptcy* ¶ 523.06[2][a], at 523-19 (15th ed. 1981).

[4] In this regard, petitioner states (Pet. 8) that, because his offers were based on inability to pay, he should not be regarded as invoking his administrative remedies when he submitted the offers. Petitioner bases this argument (Pet. 17-18) on Section 301.7122-1(d)(2) of the Treasury Regulations on Procedure and Administration (26 C.F.R.). That provision indicates that the submission of an offer in compromise does not automatically stay the collection of tax liabilities. The Regulation therefore concerns the situation in which taxes have been assessed, not a situation in which no notice of deficiency has been issued and no assessment has been made. Here, on the other hand, the Service prior to bankruptcy issued no notice of deficiency to petitioner and accordingly made no assessment of the taxes at issue.

(26 U.S.C.). But in holding that the Internal Revenue Service was prohibited from making an assessment of the liabilities prior to bankruptcy, the court of appeals followed a consistent line of authority that the prohibition to which Section 17a(1)(c) refers is the prohibition contained in Section 6213(a) of the Internal Revenue Code of 1954 (26 U.S.C.). See *In re Indian Lake Estates, Inc., supra*, 428 F.2d at 323-324; *In re Greve, supra*, 39 A.F.T.R.2d at 77-530; *In re Laytan Jewelers, Inc., supra*, 332 F. Supp. at 1165-1166; see also *In re Michaud*, 458 F.2d 953, 958-959 n.17 (3d Cir.), cert. denied, 409 U.S. 876 (1972); 1A *Collier on Bankruptcy* ¶ 17.14[4], at 1620-1621 (14th ed. 1978). Section 6213(a) prohibits assessment until after a notice of deficiency has been issued and the 90-day period for filing a petition in the Tax Court has expired or, if a petition is filed, the decision of the Tax Court becomes final.[5] This interpretation of Section 17a(1)(c) is correct because it enables potential bankrupts to utilize administrative and judicial remedies. As the Third Circuit pointed in *In re*

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[5] Petitioner cites (Pet. 9) 1A *Collier on Bankruptcy* ¶ 17.14[4] (14th ed. 1978), as support for his position that the taxes could have been assessed prior to bankruptcy. As the court of appeals pointed out (Pet. App. 39-40), however, even if petitioner's interpretation of the statement in paragraph 17.14[4] were correct, it would not support his position in this case because the negotiations were not concluded until September 16, 1975, when the offers were rejected, and the petition in bankruptcy was filed 55 days later. Thus, contrary to petitioner's contention, even if the notice of deficiency had been issued immediately after the offers were rejected, the 90-day period for filing a petition in the Tax Court would not have expired prior to bankruptcy.

Michaud, supra, 458 F.2d at 958-959 n.17, a contrary rule might well precipitate unnecessary bankruptcies.[6]

Contrary to the implication of petitioner's argument, it was his actions that caused the delay in making the assessment of the taxes at issue here. He submitted offers in compromise, rather than permit the taxes to be assessed in accordance with the proposed adjustments. Moreover, even after his submission of the offers, it was open to petitioner to withdraw them and thereby conclude the administrative process so that the taxes could be assessed. Instead, upon the rejection of his first offers, he submitted additional offers and executed waivers of the period of limitations on assessment and collection. Petitioner chose to pursue his administrative remedies. The court of appeals therefore correctly concluded that his tax liabilities were not discharged in bankruptcy under Section 17a(1)(c) of the Bankruptcy Act.

2. Petitioner also argues (Pet. 23) that the term "bankruptcy," as it is used in Section 17a(1)(c), should be interpreted to mean a discharge in bankruptcy.[7] But, as the court of appeals correctly pointed

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[6] In order to avoid a potential discharge, the Secretary of the Treasury would be prompted to make a jeopardy assessment cutting short settlement negotiations in any case in which he believed the taxpayer was likely to file a petition in bankruptcy. See *In re Michaud, supra*, 458 F.2d at 958 n.17.

[7] Section 6871 of the Internal Revenue Code of 1954 (26 U.S.C.), which petitioner cites (Pet. 22-24), has no bearing here since that Section concerns assessment of taxes after a petition in bankruptcy is filed. The issue here turns on whether assessment of the taxes was prohibited prior to bankruptcy.

out (Pet. App. 36-37 & n.5), the term bankruptcy is defined by Section 1(13) of the Bankruptcy Act, 11 U.S.C. 1(13), to mean the date on which the petition in bankruptcy was filed. That term is given a consistent meaning throughout the Bankruptcy Act to assure certainty with respect to the computation of time limits. 1 *Collier on Bankruptcy* ¶ 1.13, at 86 (14th ed. 1974). Accordingly, petitioner's assertion that the taxes could have been assessed prior to his discharge is irrelevant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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